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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ELVAN PRICE, JR., Plaintiff and Appellant, v. AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA, Defendant and Respondent.	B212806 (Los Angeles County Super. Ct. No. BC391667)

APPEAL from an order of the Superior Court of Los Angeles County, Kenneth R. Freeman, Judge. Reversed and remanded with directions.

Initiative Legal Group, H. Scott Leviant and Payam Shahian for Plaintiff and Appellant.

Paul, Hastings, Janofsky & Walker, Michael A. Hood, Brigham M. Cheney; John K. Beckley and Michael P. Wallock for Defendant and Respondent.

INTRODUCTION

Plaintiff Elvan Price, Jr., an employee of the Automobile Club of Southern California (ACSC), filed a class action in Los Angeles County Superior Court against ACSC for violations of Labor Code statutes and unfair competition. Eight months earlier, however, another plaintiff, Tinisha Felix, filed a class action complaint against ACSC in Orange County Superior Court, alleging the same causes of action and statutory violations as the subsequently filed *Price* action. ACSC demurred to the *Price* complaint on the ground of "another action pending" (Code Civ. Proc., § 430.10, subd. (c)) and on the ground of the doctrine of exclusive concurrent jurisdiction. The trial court sustained the demurrer without leave to amend and stayed the *Price* action until resolution of the *Felix* action. Price appeals.

Price claims that because he and Felix are different people, the demurrer was erroneously sustained because section 430.10(c) requires that the other pending action be "between the same parties on the same cause of action." This claim of error is forfeited on appeal because it was not raised in the trial court. In addition, the class Felix represents in the *Felix* action is the same class as Price seeks to represent in the *Price* action: non-exempt or hourly employees of defendant ACSC. Therefore members of the class represented were "the same parties" as required by section 430.10(c) and by the doctrine of exclusive concurrent jurisdiction, and the sustaining of the demurrer on this ground was not error. Failure to file a petition for coordination with the Judicial Council provides no basis for finding the trial court's order erroneous or for reversing that order.

We conclude, however, that sustaining of the demurrer without leave to amend was not the appropriate ruling in this circumstance. The relief to which a litigant is entitled upon a plea that a prior action between the same parties is pending and undetermined is the judgment specified in Code of Civil Procedure section 597 that the second action abate. We therefore reverse the order with direction to the trial court to enter an order pursuant to Code of Civil Procedure section 597 staying the Price action pending resolution of the Felix action.

FACTUAL AND PROCEDURAL HISTORY

This appeal involves another class action complaint, filed in another county superior court, eight months before Price filed his complaint.

On November 29, 2007, Tinisha Felix filed a class action complaint against ACSC in Orange County Superior Court (O7CC01421) (the *Felix* action). The complaint by Felix, employed by ACSC as a direct sales agent in its Costa Mesa office, alleged that ACSC violated Labor Code statutes by failing to pay wages and related overtime compensation, to provide meal periods, rest periods, and itemized statements, and to pay wages on termination of employment, and violated the unlawful competition laws (Bus. & Prof. Code, § 17000 et seq.) and unfair competition laws (Bus. & Prof. Code, § 17200 et seq.). Felix brought the action on her own behalf and on behalf of a class of similarly situated aggrieved employees of ACSC.

On May 29, 2008, Price filed his complaint against ACSC in Los Angeles County Superior Court (BC391667) (the *Price* action). The complaint by Price, employed by ACSC as a sales agent in its Costa Mesa office, alleged that ACSC violated Labor Code statutes by failing to pay wages and overtime compensation, to provide meal periods and rest periods, and to pay wages on termination of employment, and by providing improper wage statements. Price's complaint also alleged that ACSC violated the unfair competition laws (Bus. & Prof. Code, § 17200 et seq.). Price brought the action on his own behalf and on behalf of all non-exempt or hourly paid employees of ACSC who were employed within four years before the complaint was filed.

On August 27, 2008, ACSC filed a demurrer to Price's complaint. The demurrer alleged that pursuant to Code of Civil Procedure section 430.10, subdivision (c), the action should be dismissed or stayed because another action, the *Felix* action in Orange County Superior Court, involved the same parties and causes of action; that the action should be dismissed or stayed because of the *Felix* action pursuant to the common law doctrine of exclusive concurrent jurisdiction; and that the action should be stayed because of the *Felix* action pursuant to the trial court's inherent equitable jurisdiction.

On October 8, 2008, by minute order the trial court sustained the demurrer without leave to amend.

On December 5, 2008, Price filed a notice of appeal, purportedly from a judgment of dismissal after an order sustaining a demurrer.

On February 17, 2009, the Clerk of this court informed Price that the case information statement he had filed was not sufficient because it did not attach an appealable judgment or order, and requested Price to file a signed, file-stamped copy of a judgment of dismissal or abatement within 45 days.

On March 5, 2009, there was filed a formal written order, signed by the trial judge, which ordered ACSC's demurrer sustained without leave to amend and further ordered the action stayed until resolution of *Felix v. Automobile Club of Southern California* (OCSC Case No. 07CC01421) or further order of the court.

Defendant ACSC filed a motion to dismiss the appeal on June 24, 2009. This court deferred ruling on the motion until the case was set for oral argument.

ISSUES

ACSC moves to dismiss the appeal as having been taken from a non-appealable interlocutory order sustaining the demurrer.

Price claims on appeal that the trial court erroneously sustained the demurrer and erroneously stayed the matter.

DISCUSSION

1. *ACSC's Motion to Dismiss the Appeal Is Denied*

The right to appeal is statutory; a judgment or order is not appealable unless expressly made so by statute. (*Ricki J. v. Superior Court* (2005) 128 Cal.App.4th 783, 788.

Code of Civil Procedure section 904.1, subdivision (a)(1) permits an appeal "[f]rom a judgment[.]" The March 5, 2009, order sustaining the demurrer without leave to amend and ordering the action stayed is not a judgment and is not appealable. (*Setliff v. E. I. Du Pont de Nemours & Co*. (1995) 32 Cal.App.4th 1525, 1533.) Another statute, however, makes that order appealable. Code of Civil Procedure section 597 authorizes an appeal from an interlocutory judgment entered upon the sustaining of a demurrer based on Code of Civil Procedure section 430.10, subdivision (c).[1]

We deem the March 5, 2009, order to be an interlocutory order entered pursuant to Code of Civil Procedure section 597, determine that statute to authorize the appeal from the interlocutory order, and deny ACSC's motion to dismiss the appeal.

We further deem the prematurely filed notice of appeal to have been filed after entry of the appealable March 5, 2009, order. (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219, fn. 6; Cal. Rules of Court., rule 8.104(e).)

2. *The Trial Court Correctly Ordered the Action Stayed, But Should Not Have Sustained the Demurrer Without Leave to Amend*

a. *Because Class Members Are the Same in the Felix and Price Actions, the Trial Court Correctly Sustained the Demurrer Because Another Action Was Pending*

Code of Civil Procedure section 430.10 states: "The party against whom a complaint . . . has been filed may object, by demurrer . . . as provided in Section 430.30, to the pleading on any one or more of the following grounds: [¶] . . . [¶] (c) There is another action pending between the same parties on the same cause of action." Price argues that the trial court erroneously sustained the demurrer on this ground because he and the plaintiff in the Felix action, Tinisha Felix, are not the same person.

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[1] Code of Civil Procedure section 597 states, in relevant part: "[W]here the defense of another action pending or a demurrer based upon subdivision (c) of Section 430.10 is sustained (and no other special defense is sustained) an interlocutory judgment shall be entered in favor of the defendant pleading the same to the effect that no trial of other issues shall be had until the final determination of that other action, and the plaintiff may appeal from the interlocutory judgment in the same manner and within the same time as is now or may be hereafter provided by law for appeals from judgments."

"Under the statutory plea in abatement, '[t]he pendency of another earlier action growing out of the same transaction and between the same parties is a ground for abatement of the second action.' [Citation.] A statutory plea in abatement requires that the prior pending action be 'between the same parties on the same cause of action.' [Citation.]" (*People ex rel. Garamendi v. American Autoplan, Inc*. (1993) 20 Cal.App.4th 760, 770, italics omitted (*Garamendi*).)

Price argues that the parties are not the same in the *Felix* action and in this action, because neither the *Felix* action nor this action have yet been certified as class actions. This argument is forfeited because it is raised for the first time on appeal (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc*. (2005) 126 Cal.App.4th 668, 685), and for the first time in the reply brief (*Medill v. Westport Ins. Corp*. (2006) 143 Cal.App.4th 819, 836, fn. 3). We also reject the argument on its merits: the parties in the *Felix* and *Price* actions are the same parties because they are members of the same class.

The parties in the *Felix* action were described as current and former non-exempt ACSC employees who (1) worked more than eight hours in a day or more than 40 hours in a week and who were not paid overtime compensation; (2) worked more than five hours in a day but did not receive a 30-minute meal-period; (3) did not receive a 10-minute rest period for every four hours worked on a workday; (4) upon payment of wages, did not receive an itemized statement showing total hours worked, applicable hourly rates in effect during each pay period, and corresponding hours worked at each hourly rate; (5) when their employment was terminated, were not paid all wages due and payable as defined by California law, including overtime compensation.

The parties in the *Price* action were described as all non-exempt or hourly paid employees of defendant ACSC in California within four years before the filing of the complaint. The action alleged ACSC's failure to pay overtime compensation; failure to provide meal periods; failure to provide rest periods; failure to pay wages due upon discharge, resignation, or termination; and failure to comply with wage reporting requirements required by statute.

Thus the representative or lead plaintiffs, Felix and Price, were different people. The members of the class represented, however, were "the same parties" as required by Code of Civil Procedure section 430.10, subdivision (c). The sustaining of the demurrer on this ground was not error.

b. *Price Has Not Shown Error in the Sustaining of the Demurrer on the Ground of the Doctrine of Exclusive Concurrent Jurisdiction*

Price argues that the doctrine of exclusive concurrent jurisdiction does not support the order dismissing the matter without leave to amend. This argument incorrectly states the trial court's order. The trial court did not order the matter dismissed; it sustained the demurrer without leave to amend and ordered the matter stayed until resolution of the *Felix* action or further order by the court.

Pursuant to the doctrine of exclusive concurrent jurisdiction, when two California superior courts have concurrent jurisdiction over the subject matter and all parties involved in litigation, " ' "the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related matters have been resolved." ' " (*Garamendi, supra*, 20 Cal.App.4th at pp. 769-770.) This rule is similar to the common law plea in abatement codified in Code of Civil Procedure section 430.10, subdivision (c). "Under the statutory plea in abatement, '[t]he pendency of another earlier action growing out of the same transaction and between the same parties is a ground for abatement of the second action.' [Citation.] A statutory plea in abatement requires that the prior pending action be 'between the same parties on the same cause of action.' " (*Garamendi*, at p. 770, italics omitted.) Price again argues that because Felix and Price were different persons, the two actions were not between the same parties. The exclusive concurrent jurisdiction rule, however, "does not require absolute identity of parties, causes of action or remedies sought in the initial and subsequent actions. [Citations.] If the court exercising original jurisdiction has the power to bring before it all the necessary parties, the fact that the parties in the second action are not identical does not preclude application of the rule." (*Plant Insulation Co. v. Fibreboard Corp*. (1990) 224 Cal.App.3d 781, 788.) In addition, as stated above, we

have found that the *Felix* and *Price* actions were between the same parties. Price does not dispute that the two actions involve the same causes of action. Where a right to abatement exists under the rule of exclusive concurrent jurisdiction, the order of abatement issues as a mandatory, not discretionary, matter of right. (*Garamendi, supra*, 20 Cal.App.4th at pp. 770-771.) We find no error in the sustaining of the demurrer on the ground the doctrine of exclusive concurrent jurisdiction.

c. *It Was Error to Sustain the Demurrer Without Leave to Amend; the Proper Procedure Is Enter an Interlocutory Judgment and Order the Action Stayed*

Price argues that the trial court erroneously stayed the *Price* action after sustaining the demurrer without leave to amend. We find that although the trial court correctly sustained the demurrer on the grounds of another action pending and the doctrine of exclusive concurrent jurisdiction and correctly ordered the action stayed, it was error to sustain the demurrer without leave to amend.

A plea in abatement is not a request that an action be terminated, but that it be continued until there has been a disposition of the first action. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 253, fn. 26.) Dismissal of the action is not appropriate, because there has been no showing of a determination on the merits of the pending action that would definitively bar the later action on the same cause. (*Shuffer v. Board of Trustees* (1977) 67 Cal.App.3d 208, 217.) "[T]he correct remedy is to abate (stay) the action pending resolution of the condition giving rise to the plea." (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 458; *Garamendi, supra*, 20 Cal.App.4th at p. 771; *Plant Insulation Co. v. Fibreboard Corp., supra*, 224 Cal.App.3d at p. 792.)

"Code of Civil Procedure section 597 provides in relevant part that where 'a demurrer based upon subdivision (c) of Section 430.10 is sustained . . . an interlocutory judgment shall be entered in favor of the defendant pleading the same to the effect that no trial of other issues shall be had until the final determination of that other action[.]' In *Lord v. Garland* (1946) 27 Cal.2d 840, the court explained the function of such a judgment: 'The purpose of the interlocutory judgment . . . is to permit the trial court to retain jurisdiction over the subsequent action so that when a final determination is had in

the prior pending action the court will be empowered to determine the issues in the subsequent suit. If a judgment upon the merits is rendered in the suit first commenced, the party asserting the plea in abatement should be granted leave to amend to plead the *res judicata effect* of the judgment in bar of the subsequent action. But if . . . the prior litigation is not determined upon the merits, the trial court should hear and decide the rights of the parties in accordance with the issues presented by the pleadings in the second action.' (*Id.* at p. 851[.])" (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 336, fn. 2.)

"The only relief to which a litigant is entitled upon the plea, by either demurrer or answer, that a prior action between the same parties is pending and undetermined is the judgment specified by section 597, Code of Civil Procedure, that the second action abate." (*Lord v. Garland*, *supra*, 27 Cal.2d at p. 851.)

Therefore although the order staying the matter and sustaining the demurrer was correct, it was error to sustain the demurrer without leave to amend. We will therefore reverse the order and remand with directions to the trial court to vacate its March 5, 2009, order and to enter a new and different order, pursuant to Code of Civil Procedure section 597, that an interlocutory judgment shall be entered in favor of the defendant to the effect that no trial of other issues shall be had until the final determination of that other action, i.e. that the action be stayed until resolution of *Felix v. Automobile Club of Southern California* (OCSC Case No. 07CC01421) or further order of the court.

d. *The Failure of ACSC, and of Price, to File a Petition for Coordination With the Judicial Council Provides No Basis for Reversal of the Trial Court's Order*

Price claims that ACSC should have filed a petition for coordination pursuant to California Rules of Court, rule 3.501 and Code of Civil Procedure section 404.

Petitions for coordination are submitted to the Chairperson of the Judicial Council. (Code Civ. Proc., § 404.) ACSC's failure to file such a petition provides no ground for finding the trial court's order erroneous or for reversing that order. Price was also entitled to file a petition for coordination (*ibid*.[2]), but did not do so. We find no basis for reversing the order on this ground.

e. *The Prohibition Against "Virtual Representation" Does Not Invalidate the Trial Court's Order*

Price claims that because the trial court sustained ACSC's demurrer without leave to amend, he is forever barred from independently asserting his rights before any tribunal.

The interest in suing on another's behalf is not a property right beyond statutory control. (*Alvarez v. May Dept. Stores Co*. (2006) 143 Cal.App.4th 1223, 1234.) To the extent that his claims differ from those of the class of plaintiffs of which he is a member in the *Felix* action, he remains free to litigate those claims. (*Id*. at p. 1238.)

In an attempt to circumvent the mandatory issuance of an abatement order pursuant to Code of Civil Procedure section 430.10 and the exclusive concurrent jurisdiction rule, Price argues that the trial court's order must have found Felix to be the "virtual representative" of Price, prohibited by *Taylor v. Sturgell* (2008) __ U.S. __ [128 S.Ct. 2161][3]. The "virtual representation" doctrine held that a judgment in a prior proceeding could bind a person who (1) was adequately represented by a party to the prior adjudication, and (2) had an identity of interests with a party to the prior judgment, and either (3) had a close relationship with his putative representative, (4) substantially participated in the first case, or (5) engaged in tactical maneuvering to avoid preclusion

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[2] Code of Civil Procedure section 404 states, in relevant part: "When civil actions sharing a common question of fact or law are pending in different courts, a petition for coordination may be submitted to the Chairperson of the Judicial Council, by the presiding judge of any such court, or by any party to one of the actions after obtaining permission from the presiding judge, or by all of the parties plaintiff or defendant in any such action."

[3] We note that Price did not make this argument in opposing the demurrer in the trial court.

by the prior judgment. (*Id*. at p. 2169-2170.) Rejecting this theory of virtual representation, *Taylor* held that "[t]he preclusive effects of a judgment in a federal-question case decided by a federal court should instead be determined according to the established grounds for nonparty preclusion described in this opinion." (*Id*. at p. 2178.)

Taylor, however, does not apply in this case. *Taylor* was an issue preclusion case. This case does not involve erroneous issue preclusion, as there is no prior judgment that binds Price or which is being used to preclude Price from proceeding with his action. Here an abatement order has stayed the *Price* action pending completion of the *Felix* action.

The rule against nonparty preclusion, moreover, makes an exception for class actions. " '[I]n certain limited circumstances,' a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit. [Citation.] Representative suits with preclusive effect on nonparties include properly conducted class actions[.]" (*Taylor v. Sturgell, supra*, 128 S.Ct. at p. 2172.) In a class action, "a person not named as a party may be bound by a judgment on the merits of the action, if she was adequately represented by a party who actively participated in the litigation." (*Id*. at p. 2167.) Although disapproving the doctrine of preclusion by virtual representation, *Taylor* did not alter the exception for the preclusive effect of class actions on non-parties. We reject the argument by Price that the trial court's order, to be valid, must have found Felix to be the "virtual representative" of Price. The trial court's order made no such finding, express or implied.

DISPOSITION

The motion by the Automobile Club of Southern California to dismiss the appeal is denied.

The March 5, 2009, order is reversed, and the matter is remanded to the trial court with directions to vacate its March 5, 2009, order and to enter a new and different order, pursuant to section 597, that an interlocutory judgment shall be entered in favor of the defendant to the effect that no trial of other issues shall be had until final determination of the other action, i.e. that the action be stayed until resolution of *Felix v. Automobile Club of Southern California* (OCSC Case No. 07CC01421) or further order of the court.

Costs on appeal are awarded to defendant Automobile Club of Southern California.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.